



Signed: November 10, 2005

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
QMECT, INC., etc.,
Debtor-in-Possession.

No. 04-41044 T
Chapter 11

In re
FRED AND LINDA KOELLING,
Debtors-in-Possession.

No. 04-46443 T
Chapter 11

QMECT, INC., etc.,
Plaintiff,

A.P. No. 04-4190 AT
A.P. No. 04-4365 AT
A.P. No. 04-4366 AT

vs.

(Consolidated)

BURLINGAME CAPITAL PARTNERS II,
L.P., etc. et al.,

Defendants.

AND RELATED ADVERSARY PROCEEDINGS

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MEMORANDUM OF DECISION RE ADMISSIBILITY OF DOCUMENTS

The Court directed the parties to file briefs addressing the admissibility of two documents: (1) the Comerica Bank Loan Interest and Principal Statement (the "Comerica Statement") and (2) the Qmect Trial Balance as of February 26, 2004 (the "Qmect Trial Balance"). Both parties filed briefs. Burlingame Capital Partners II, L.P. and Electrochem Funding, LLC (collectively "Burlingame") filed an unauthorized reply brief. The above-captioned debtors-in-possession (the "Debtors") filed a motion to strike the reply brief, to which Burlingame responded. The Court has reviewed all of the filings and concludes as follows:

1. The motion to strike Burlingame's reply brief will be granted. The reply brief was not authorized and was not warranted by the circumstances without authorization.

2. The testimony of David Ferree was inadequate to establish a foundation for admissibility of the Comerica Statement as a business record. His testimony clearly indicated that he had no personal knowledge of how this document was prepared. The deficiency does not lie with the fact that he was not responsible for the account until just prior to the completion of the sale of the Qmect loans to Burlingame. The deficiency lies with the fact that the document was prepared and maintained in a different location and that he has no direct knowledge of the procedures followed by that office in preparing and maintaining the document. His designation by Comerica as a custodian of records does not cure that deficiency. However, the Court will admit the document

1 under FRE 807. Credible testimony was presented that this is a
2 document upon which Comerica relied in connection with its own
3 business operations. The Court concludes that this is a
4 sufficient guaranty of its trustworthiness to justify its
5 admission into evidence. The lack of any direct evidence of how
6 the document was prepared will be taken into account in the weight
7 to be accorded it.

8 3. The Court also concludes that a sufficient foundation has
9 not been established for admitting the Qmect Trial Balance into
10 evidence as a business record. However, the Court will admit the
11 Qmect Trial Balance into evidence as an admission subject to a
12 motion to strike if later testimony establishes that its admission
13 was improvident.

14 Good cause appearing therefor, it is

15 SO ORDERED.

16 END OF DOCUMENT
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